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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

DONALD P. HODEL,
SECRETARY OF THE INTERIOR, ET AL.,
Petitioners,

v.

STATE OF MISSOURI, ET AL.,
Respondents.

ETSI PIPELINE PROJECT,
Petitioner,

v.

STATE OF MISSOURI, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR THE STATES OF MONTANA, NORTH DAKOTA, SOUTH DAKOTA AND WYOMING AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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90 Cong. Rec. 8546 (1944) 31, 33
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90 Cong. Rec. 9263 (1944) 36
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OTHER AUTHORITIES

A. Maass, *Muddy Waters, The Army Engineers and the Nation's Rivers* (1951) 11

M. Ridgeway, *The Missouri Basin's Pick-Sloan Plan* (Univ. of Illinois Press, 1955) 13, 25, 36, 39, 40

U.S. Army Engineer Division, Missouri River Corps of Engineers, *Missouri River Main Stem Reservoir System, Reservoir Regulation Manual: Master Manual* (1979) 19, 20

U.S. Army Corps of Engineers, Missouri River Division, *1986-1987 Annual Operating Plan* (1986) 3, 19, 20

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The States of Montana, North Dakota, South Dakota, and Wyoming as *amici curiae* pursuant to Supreme Court Rule 36.4 urge the Court to reverse the judgment of the United States

Figure A: Map of Missouri River Basin (*reprinted from* U.S. Army Corps of Engineers — Missouri River Division, *1986-1987 Annual Operating Plan*).

Court of Appeals for the Eighth Circuit in *Missouri v. Andrews*, 787 F.2d 270 (8th Cir. 1986) for the reasons set forth herein. This brief is presented to support and supplement the arguments presented by the Solicitor General and ETSI Pipeline Project (formerly designated Energy Transportation Systems, Inc.), as Petitioners. This Court granted the petitions for certiorari in and consolidated the above-captioned cases on March 2, 1987. On April 9, 1987, the Court extended the time for Petitioners to file their briefs on the merits to and including May 16, 1987. On March 31, 1987, Justice Blackmun granted *amici* leave to file a 50-page brief.

INTEREST OF AMICI CURIAE

The States of Montana, North Dakota, South Dakota and Wyoming (hereinafter "Upper Basin States") comprise the entire Upper Basin of the mainstem of the Missouri River and its principal tributaries. *See* Figure A (map of Missouri River Basin). All six mainstem dams on the Missouri River lie within the territorial boundaries of the Upper Basin States. Those dams are:

Name	Gross Storage Capacity[1]
1. Fort Peck (in Montana)	18,909,000 acre-feet
2. Garrison (in North Dakota)	23,923,000 acre-feet
3. Oahe (in North and South Dakota)	23,337,000 acre-feet
4. Big Bend (in South Dakota)	1,874,000 acre-feet
5. Fort Randall (in South Dakota)	574,000 acre-feet
6. Gavins Point (in South Dakota and Nebraska)	504,000 acre-feet

The dams were constructed under the authority of the Flood Control Act of 1944, Pub. L. No. 78-534, 58 Stat. 887 (hereinafter the "Act").

The instant controversy arose when the South Dakota Water Management Board granted a permit for energy industry

[1] *See* U.S. Army Corps of Engineers, Missouri River Division, *1986-1987 Annual Operating Plan*, Plate No. 11 (Summary of Engineering Data — Missouri River Main Stem Reservoirs).

use to the South Dakota Conservancy District for the annual consumptive use of 50,000 acre-feet of water stored in Lake Oahe. The South Dakota Conservancy District thereupon assigned the permit to the ETSI Pipeline Project (hereinafter "ETSI"), which intended to use the water for processing coal for transportation in a slurry pipeline from Wyoming to the Gulf Coast States. ETSI then obtained a Water Service Contract from the Bureau of Reclamation ("Bureau") to compensate the Bureau for the service of providing storage of water allocated to reclamation projects not yet constructed.[2] The Bureau provides this reclamation storage in Lake Oahe for the benefit of Upper Basin States and has authority under the reclamation laws to make such storage available for municipal and industrial use.[3] ETSI also obtained a permit from the United States Army Corps of Engineers ("Corps") to construct a pumping station for removal of water from Lake Oahe and a right-of-way from the Corps for a pipeline across federal land adjacent to Oahe.

The States of Iowa, Missouri, and Nebraska (hereinafter "Lower Basin States"), Respondents herein, commenced this lawsuit in federal district court in Nebraska to block ETSI's diversion of water from Lake Oahe. The ostensible purpose of the suit was to challenge the authority of federal officials to execute certain contracts regarding Lake Oahe water. But the real issues transcend the question of bureaucratic authority and involve fundamental questions of priority between downstream navigation uses and upstream beneficial consumptive uses of mainstream Missouri River water and the sovereign right, power and authority of the Upper Basin States over the waters

[2] The Bureau of Reclamation does not own water, allocate water rights or sell water; it merely performs the service of storing water. *See* 90 Cong. Rec. 8485 (Sen. O'Mahoney), 8551 (Sens. O'Mahoney and Burton), 9279 (amendments nos. 11 and 13) (1944).

[3] Reclamation Project Act of 1939, § 9(c), 53 Stat. 1187, 1194-95 (codified at 43 U.S.C. § 485h(c)).

of the Missouri River stored for reclamation purposes behind the mainstem dams located in the Upper Basin States.[4]

The Eighth Circuit's ruling in favor of the Lower Basin States in *Missouri v. Andrews* threatens to place the entire storage capacity of mainstem dams on the Missouri River under the effective control of the Corps of Engineers, deprive the Secretary of Interior of authority to devote any mainstem Missouri River water to reclamation purposes, and thus substantially limit the Upper Basin States' right, power and authority to allocate the use of waters wholly within their territorial boundaries. It also upsets the balance Congress struck in the Missouri Basin between state and federal authority over the river and between Upper Basin and Lower Basin States over its use. The United States has recognized the error in the lower court's division of authority between the Corps and Bureau and, as Petitioner herein, is aggressively seeking to correct that error. Because of the guileful drafting of Respondents' Complaint, Montana, North Dakota and South Dakota appear before this Court not as parties but as *amici curiae* only. These States, as well as Wyoming, have more at stake than either Petitioner, because the ruling below deprives them of their sovereign power over their most precious natural resource, their water.

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[4] Recognizing that the dispute presented a controversy between states, South Dakota filed an original action in this Court. *See* South Dakota v. Nebraska, et al., No. 103 Orig. North Dakota intervened in that action and Wyoming joined as an *amicus*. A "Renewed Motion For Leave To File Complaint" is pending, awaiting the outcome of this case.

line Project ("ETSI") without obtaining the approval of the Army Secretary. The contract would have allowed ETSI to take 20,000 acre feet of water per year from the Oahe Reservoir for use as a transportation medium for crushed coal in a proposed pipeline extending from the Powder River Basin in Wyoming to power plants in the mid-South. The private party respondents, along with the States of Missouri, Iowa and Nebraska (hereinafter "State respondents") then brought the instant proceedings challenging the contract on several grounds in federal court.

On May 3, 1984, Chief Judge Warren K. Urbom of the United States District Court for the District of Nebraska ruled in favor of one argument advanced by both the private party and State respondents, concluding that the 1944 Flood Control Act did not provide the Interior Secretary authority to approve the ETSI contract. Accordingly, Judge Urbom entered summary judgment against the petitioners, permanently enjoining contract performance. ETSI, Inc. and the Interior Secretary appealed Judge Urbom's decision.[2]

On July 31, 1984, ETSI announced that it had terminated its project. The respondents then suggested that the appeals should be dismissed as moot or unripe. After remanding the proceedings to the District Court for an initial mootness determination, a split panel of the Eighth Circuit ruled that the case was not moot.

The Eighth Circuit issued its 2-1 decision on March 31, 1986 affirming Judge Urbom on the merits of the appeal. The Court of Appeals concluded that the purpose, plain language and legislative history of the 1944 Flood Control Act failed to provide authority for the Interior Sec-

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[2] After initially dismissing the private party respondents for lack of standing to challenge the Interior Secretary's authority, Judge Urbom vacated that decision and allowed them to participate in the appeals. The Eighth Circuit did not reach the issue of standing with respect to the private party respondents in its opinion below, and that issue is not raised here by the petitioners.

retary to enter unilaterally into the ETSI contract. An evenly divided Eighth Circuit denied rehearing on July 10, 1986.

SUMMARY OF THE ARGUMENT

This case does not merit review by the Court. It is correctly decided, and it has limited effect.

This case concerns the only contract ever signed by the Secretary of the Interior in his Department's effort to market water for industrial use from a main stem Missouri River reservoir absent prior Army approval. The project which required the contract has been terminated. The decision below closely follows the language of the 1944 Flood Control Act in enjoining the contract, and leaves available the Army procedures Congress clearly delineated in the 1944 Act for access to main stem Missouri River waters for industrial use.

The decision relies as well upon the legislative history of the 1944 Flood Control Act, which includes two flat rejections of amendments that would have granted the Interior Secretary authority like that he now claims. Given the clear assignment of industrial water marketing responsibility to the Army spelled out in the 1944 Act, the Court of Appeals properly refused to defer to Interior's assertion of implied competing authority. In so doing, the Court below remained faithful to the purpose of the Congress when it allocated the authority for Missouri River Basin projects between Army and Interior.

REASONS TO DENY THE PETITIONS

I. The Decision Below Is Limited Both In Scope And Effect Because The ETSI Project Has Been Terminated And Because That Project Was The Only Element Of Interior's Unilateral Water Marketing Program.

There are no broad questions of law presented by this case. To the contrary, given the current state of the facts, the decision below has a decidedly limited effect.

First, the ETSI contract enjoined in this action was the only contract ever entered into by the Secretary of the Interior under his plan to market water for industrial use from main stem Missouri River reservoirs without prior Army approval or authorization.[3] Apparently Interior's program is now dormant. Therefore, any ruling in this case would have no effect on any existing efforts by the Interior Secretary to implement that program.

Second, ETSI announced the termination of its project in July of 1984 and has not revived the project. Moreover, on July 31, 1984, ETSI terminated its agreement with the South Dakota Conservancy District for assignment of a water right from Oahe Reservoir and has not renewed that agreement. Indeed, ETSI, Inc., which was the corporate entity named to represent ETSI as a party below, has been dissolved.[4] Thus there is a real question whether this case presents any live controversy as to ETSI.

For these reasons, the decision raises no issue worthy of review by this Court.

II. The Decision Below Leaves Industrial Access To Main Stem Missouri River Water Undisturbed.

A. The Army Secretary Remains Authorized To Enter Into Industrial Water Marketing Contracts At Main Stem Missouri River Reservoirs.

The petitioners and *amici* argue that the decision below forecloses industrial access to water in main stem Mis-

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[3] The petitioners refer to three contracts for the industrial use of water from Missouri River main stem reservoirs which they claim could be affected by the decision below. However, each of these contracts was entered into following the procedures adopted in the MOU. Thus, the Eighth Circuit correctly found that the ETSI contract is the only example of Interior's assertion of authority under the 1944 Act without prior approval by the Army. (See Pet. App. 11a.)

[4] ETSI, Inc. advised the Clerk of this Court that it had been dissolved by letter dated January 27, 1987.

souri River reservoirs. This argument largely ignores the Secretary of the Army's ability to market industrial water from those very reservoirs.

The government attempts to minimize the fact that access to industrial water on the Missouri is available through the Army by focusing solely on the Interior Secretary while conceding in a footnote that its petition raises no issue concerning Army's authority. Hodel Pet. at 12 n.13. ETSI briefly describes Army's authority, but suggests that it is insufficient despite the fact that the Army enjoys power to make available water in the amounts the ETSI project required. ETSI Pet. at 20 n.28.

In any event, the decision below leaves in place the Army's historical statutory ability to market water for industrial use either under Section 6 of the 1944 Flood Control Act, 58 Stat. 890 (codified at 33 U.S.C. § 708), or under the 1958 Water Supply Act, 43 U.S.C. § 390b (b). Under that Army authority, if the ETSI project were still alive, there would be nothing to prevent it from applying, or from fostering an application, to the Army for the water service it requires.

In fact, after entry of the ruling below by the District Court, the State of South Dakota filed precisely such an application on ETSI's behalf with the Army Corps of Engineers, invoking the 1958 Act. The Corps immediately began processing that application, and halted the process only upon termination of the ETSI project. The fact that the petitioners availed themselves of existing Army procedures competely belies their suggestion here that the decision below "locks up" the water in Oahe reservoir and prevents industrial use.[5]

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[5] The petitioners' additional suggestion that marketing water for industrial use by Army rather than by Interior would adversely affect the government's ability to recoup costs is likewise incorrect. Both Section 6 of the 1944 Flood Control Act, and the 1958 Water

B. Previous Contracts Entered Into By The Interior Secretary With Prior Army Approval Are Unaffected By The Decision.

Given the admitted existence of Army authority which provides adequate procedures for industrial use of main stem Missouri River water,[6] the Secretary of the Interior can only argue that the decision below should be reviewed merely because he has entered into other "similar" contracts, and "may wish to execute other such contracts in the future." Hodel Pet. at 13. As noted earlier, however, the Court of Appeals correctly determined that the ETSI contract is the *only* contract for industrial water use from Army reservoirs on the Missouri River ever entered into unilaterally by the Interior Secretary. (See Pet. App. 11a.) Accordingly, the decision below has no effect on other contracts.

Additionally, to the extent the Interior Secretary believes that his Department should be involved in industrial water service contracts at main stem Missouri River

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Supply Act, contemplate that the Army will require payment for industrial water use. In fact, in Section 932 of the Water Resources Development Act of 1986, the Congress recently reaffirmed its intention that Army recoup costs for industrial water use. 132 Cong. Rec. H11511 (October 17, 1986); *see* 132 Cong. Rec. S2440 (March 11, 1986).

[6] Existing Army regulations under the 1958 Water Supply Act allow up to 50,000 acre feet of water to be marketed from Army reservoirs annually for industrial use. Corps of Engineers Project Purpose Planning Guidance, Regulation ER 1105-2-20, Section 7.3(b) (January 29, 1982). Respondents understand that changes in policy under Section 6 of the 1944 Act that would allow industrial marketing in even greater volumes are currently under review by the Army. The private party respondents note this recent development, as well as the Congressional action identified in the previous footnote, in order that the Court be fully apprised of matters that may affect the petitions. *See, Tiverton Bd. of License Comm'rs v. Pastore*, 469 U.S. 238 (1985).

reservoirs, he remains free under the decision below to explore some new understanding with the Army Secretary, or to return to the Congress to seek the authority which Congress refused him in 1944. In any event, the fact that the Interior Secretary may wish at some future time to enter into other industrial water service contracts with entities who are not parties here surely provides no basis for this Court to review this case. *See, International Paper Co. v. Ouellette*, 55 U.S.L.W. 4138, 4146 (U.S. January 21, 1987) (Stevens and Blackmun, J.J., concurring in part and dissenting in part) (Court does not sit to draft advisory opinions for possible future guidance of other courts).

III. The Decision Below Is Correct On The Merits And Is Reasonable As A Matter Of Public Policy.

A. The Decision Is Fully Supported By The Plain Language And Legislative History Of The 1944 Flood Control Act, Which Denies The Interior Secretary Authority To Enter Into The ETSI Contract.

The Court of Appeals decision is clearly correct on the merits. It is fully supported not only by the plain language of the 1944 Flood Control Act, which sets out the allocation of authority in the Missouri River Basin between the Interior Secretary and the Army Secretary, but also by the legislative history of that Act.

Sections 6, 8 and 9 of the 1944 Act dictate that Army rather than Interior enjoys the authority to market water for industrial use from main stem Missouri River reservoirs. In brief, Section 6 provides that the Army Secretary shall have authority over all industrial water uses at reservoirs he controls. (Pet. App. 81a.) With respect to such Army-controlled reservoirs, Section 8 provides the Interior Secretary with authority over only such water and water works as are used in irrigation. (Pet. App. 82a-83a.) Finally, Section 9(c) triggers the

Interior Secretary's power under the reclamation laws only with respect to those projects which have been undertaken by him. Those projects do not include Oahe.[7] (Pet. App. 83a-84a.)

Therefore, because ETSI sought water for industrial use (not for irrigation), and because Oahe was built and is operated by the Army, the plain language of the 1944 Act simply does not grant the Interior Secretary authority to enter into the ETSI contract. Instead, the language of the Act directs those seeking Oahe water for industrial purposes to make their agreements with the Army. (See Pet. App. 18a-21a.)

Since the plain language of the statute dictates only one conclusion, that language governs. *United States v. Clark*, 454 U.S. 555, 560 (1982); *TVA v. Hill*, 437 U.S. 153, 184 n.29 (1978). Accordingly, the decision below was entirely correct, and it does not merit review.

Moreover, even if the language of the 1944 Flood Control Act were not so conclusive, the legislative history of the Act demonstrates without question that the Interior Secretary does not possess the authority he seeks. Specifically, during the deliberations attending passage of the 1944 Act, when confronted with then-Secretary Ickes' argument that Interior should be granted authority to enter into industrial water service contracts at reservoirs such as Oahe, Congress refused to accept his proposed amendment. (See Pet. App. 28a-29a). In addition, during those same 1944 deliberations, Congress deleted language proposed for Section 8 which would have granted the Interior Secretary broad authority to regulate water stored in Oahe. Instead, Congress substituted the current language of Section 8, which limits Interior's authority

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[7] The petitioners do not dispute that the Oahe Reservoir was constructed and is operated by the Army Department, rather than by the Interior Department.

over main stem reservoirs to regulation of water used in irrigation. (See Pet. App. 24a-28a.)

These actions by the 1944 Congress—actions that go unmentioned by the petitioners despite being central to the decision below—demonstrate that Congress considered and denied the very authority which the Interior Secretary now seeks.

B. The Decision Properly Declines To Defer To An Interpretation Of The 1944 Flood Control Act By The Interior Secretary Because That Interpretation Conflicts With The Act's Plain Language And Legislative History As Well As With A Contrary Interpretation By The Army.

The Interior Secretary and ETSI argue finally that the decision below should be reviewed for the reason that it undermines the concept of deference to agency interpretations of their empowering statutes articulated in *Chevron, U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Hodel Pet. at 16; ETSI Pet. at 24-25. However, the decision below is fully consonant with *Chevron* and its progeny. It formulates no new deference principles, and it correctly applies existing law.

Contrary to the suggestion by ETSI, the decision below does not attempt to carve out a "jurisdictional issue" exception to deference. Instead, the Court of Appeals expressly relied upon *Chevron* to inform its analysis. (See Pet. App. 32a-33a.) As the court below correctly observed, *Chevron* and its progeny counsel deference when two conditions obtain: first, the agency offering the construction must enjoy the power to administer the provision it construes; second, the construction must be reasonable. Neither of these circumstances is found here.

As discussed earlier, Section 6 of the 1944 Flood Control Act clearly authorized the Army Department to market water for industrial use from main stem Missouri River reservoirs, and the 1944 Congress rejected

language which would have granted similar authority to the Interior Department. Thus, the 1944 Act simply does not empower Interior to market water for industrial use from Oahe Reservoir. Moreover, the internal memorandum by Interior's Solicitor prepared thirty years after the fact in 1974, and to which the petitioners insist deference is due, unreasonably ignored both the language of Section 6 and the legislative history of the 1944 Act. In addition, the Acting General Counsel of the Army expressly disagreed with the Solicitor's conclusion in a contemporaneous analysis prepared during 1974. Accordingly, this case simply presents no basis for deference under the reasoning of *Chevron*.

Each of the other cases relied upon by the petitioners is distinguishable on the same ground. Unlike this case, in each of the petitioners' cases the statute under review unequivocally empowered the agency offering the interpretation to administer the provision in question.[8]

For example, in the case cited prominently by ETSI, *Commodity Futures Trading Commission v. Schor*, 106 S.Ct. 3245 (1986), this Court deferred to an interpretation by the CFTC of its own enabling statute (the Com-

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[8] *See, Commodity Futures Trading Comm'n v. Schor*, 106 S.Ct. 3245, 3250 (1986) (review of CFTC interpretation of its own enabling act); *Young v. Community Nutrition Inst.*, 106 S.Ct. 2360, 2362, 2366 (1986) (review of interpretation by FDA of act which expressly vested interpretive power in FDA); *Federal Deposit Ins. Corp. v. Philadelphia Gear Corp.*, 106 S.Ct. 1931, 1935, 1938-39 (1986) (review of FDIC interpretation of its enabling laws); *United States v. City of Fulton*, 106 S.Ct. 1422, 1426 and n.3, 1427-28 (1986) (review of Energy Secretary's interpretation of provision which unquestionably vested power in him); *United States v. Riverside Bayview Homes, Inc.*, 106 S.Ct. 455, 457 and n.1 (1986) (review of Corps of Engineers interpretation of Clean Water Act provision which expressly empowered Corps to control permits affecting wetlands); *Connecticut Dep't of Income Maintenance v. Heckler*, 471 U.S. 524, 530-31 n.16 (1985) (review of interpretation by HHS Secretary of Medicaid provision under act which expressly provided interpretive authority to the Secretary);

modities Exchange Act) only after noting that the interpretation was a "longheld position" which was "well within the scope of its delegated authority." *Id.* at 3254. Similarly, in the one case relied upon by the Interior Secretary, *United States v. City of Fulton*, 106 S.Ct. 1422 (1986), this Court deferred to an interpretation of Section 5 of the 1944 Flood Control Act by the Secretary of Energy after emphasizing that there was no question concerning the existence of his authority to administer the section under review. *Id.* at 1426-1427. In this case, the existence of authority is precisely the question presented. For this reason, the Court of Appeals properly declined to defer to the Interior Secretary's unreasonable construction of the 1944 Flood Control Act.[9]

C. The Decision Furthers The Public Interest By Confirming The Procedures That Protect Existing Users Of Missouri River Water.

The decision below should remain undisturbed for an additional reason. Unlike the result which would obtain if the petitioners were to prevail, the decision below protects the rational division of authority between the Interior Department and the Army Department established by the 1944 Congress. Under the decision, those seeking water for industrial purposes from main stem Missouri River reservoirs can simply apply to the Army

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Chemical Manufacturers Ass'n v. Natural Resources Defense Council, Inc., 470 U.S. 116, 118 n.2 (1985) (review of EPA interpretation of provision of Clean Water Act which expressly directed EPA to administer its terms).

[9] In a final attempt to persuade this Court of the need to review this case, the petitioners emphasize the even division of the Court of Appeals in denying rehearing. This argument of course overlooks the fact that there was no division whatever between the conclusions of both lower courts; the Court of Appeals affirmed the district court's conclusion on the merits. In any event, a closely-divided denial of rehearing does not provide a sufficient basis for certiorari. *See, Ratchford v. Gay Lib*, 434 U.S. 1080 (1978) (certiorari denied when court of appeals evenly split in denying rehearing).

under Section 6 of the 1944 Act (or under the 1958 Water Supply Act) rather than applying to the Secretary of the Interior under Section 9(c). Unlike the provisions of the reclamation laws which are triggered by Section 9(c), Section 6 requires the Army to consider the effect of the application upon existing users of water. The 1958 Act likewise protects against any significant changes in the operations or purposes of the affected reservoir as a result of industrial water diversions.

Thus, unlike Section 9(c), both the 1958 Act and Section 6 contain protections against excessive water depletion from main stem reservoirs of the Missouri. Allowing Interior to compete with Army for the marketing of water for industry from these reservoirs would upset the existing allocations of responsibilities which allow for smooth functioning of the two agencies in protecting all those who now depend upon the waters of the Missouri. For this reason, the decision below is not only correct, it is in the public interest.

CONCLUSION

For each of the foregoing reasons, the petitions for a writ of certiorari should be denied.

Respectfully submitted,

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the downstream states. Instead of a law that reserved Missouri River waters within the four western reclamation states to those states for allocation according to state law and for reclamation development in cooperation with the Bureau of Reclamation, in Respondents' view Congress turned those waters over to the Corps. Obviously, Congress did no such thing.

What then did Congress intend in Section 6? The key term is "surplus water," and that term is not defined in the Act. However, the concept was not new in legislation authorizing Corps Civil Works projects. The Rivers and Harbors Act of 1888, 25 Stat. 400, 417, granted the Secretary of War authority to license private power generation on a Corps project, "*Provided*, that the leases or licenses shall be limited to the use of the surplus water not required for navigation . . . ." Fourteen years later, in the Rivers and Harbors Act of 1902, a similar licensing authority was granted to the Secretary with an identical proviso limiting the licenses "to the use of the surplus water not required for navigation . . . ." 32 Stat. 331, 358.

Given this background and the structure of the 1944 Act, the term "surplus water" should be construed as water under the jurisdiction of the Corps that becomes, from time to time, surplus to the needs of navigation and flood control. In practicality, these will be flood waters. When the river is full and a flood occurs, there is need to use the empty flood control capacity of the reservoirs and no need to release water for navigation. Those flood waters are surplus to the purposes of the Corps and are subject to the Corps' contracting authority.

It should be recalled that Section 10 of the 1944 Flood Control Act authorizes some 90 projects located elsewhere in the country than in the Missouri Basin, and that many of the provisions of the Act were standard phraseology in Corps' Civil Works legislation. Section 6 applies, of course, to the Section 10 projects as well as to the Missouri Basin projects. Limiting the Corps' Section 6 authority over the Missouri Basin dams to

that portion of the stored water devoted to Corps functions allows Section 6 to operate equally on Section 10 projects and Missouri Basin projects, harmonizes the section with other sections of the Act protecting states' rights in mainstream water and tracks earlier usage of the term "surplus water" in prior Corps legislation. As demonstrated in Section II of this brief, it also comports with the legislative history and the Corps' reservoir operating regulations.[11]

Prior to the Eighth Circuit's ruling, the Corps defined surplus water as that water which is not otherwise "utilized to fill an authorized project purpose." U.S. Army Corps of Engineers Project Purpose Planning Guidance ER-1105-2-20. The only water that is surplus under this interpretation — and thus available for sale under Section 6 of the Act — is spilled water. Water allocated for reclamation, irrigation, or power generation is not surplus, because it is utilized to fill an authorized project purpose. The court of appeals was aware of this problem but did not offer any satisfactory explanation for how the Corps could redefine "surplus" to satisfy all the consumptive uses that

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[11] The Corps allocates the storage space in the six mainstem dams into four categories: 1) exclusive flood control reserve; 2) annual flood control and multiple-use capacity; 3) carry-over multiple-use capacity; and 4) inactive capacity. *See* Figure B (diagram); U.S. Army Engineer Division, Missouri River Corps of Engineers, *Missouri River Main Stem Reservoir System, Reservoir Regulation Manual: Master Manual,* V-1 to V-2 (1979). 6.3% of the total mainstem storage capacity of the six mainstem dams is allocated to the exclusive flood control category. *See* U.S. Army Corps of Engineers, Missouri River Division, *1986-1987 Annual Operating Plan,* Plate No. 11 (1986). This space is reserved for "detention of extreme or unpredictable flood flows," *Master Manual, supra,* at V-I. An additional 15.7% of the total mainstem storage capacity is reserved for the annual flood control and multiple-use capacity category. *See 1986-1987 Plan, supra,* at Plate 11. This space is for "normal flood flows" and annual multiple-purpose regulation of the impounded flood waters. *Master Manual, supra,* at V-1. The capacity in this zone is evacuated to a predetermined level by March 1 of each year to provide storage space for the flood season. When this flood water is evacuated, it is used for multiple-use purposes to the extent consistent with the principal concern of flood control. *Id.* at V-1 to V-2. This is the water that may properly be viewed as "surplus water" subject to sale by the Corps under Section 6 of the Flood Control Act of 1944, 58 Stat. at 890 (codified at 33 U.S.C. § 708).

MISSOURI RIVER MAIN STEM RESERVOIRS

COMBINED STORAGE CONTENTS

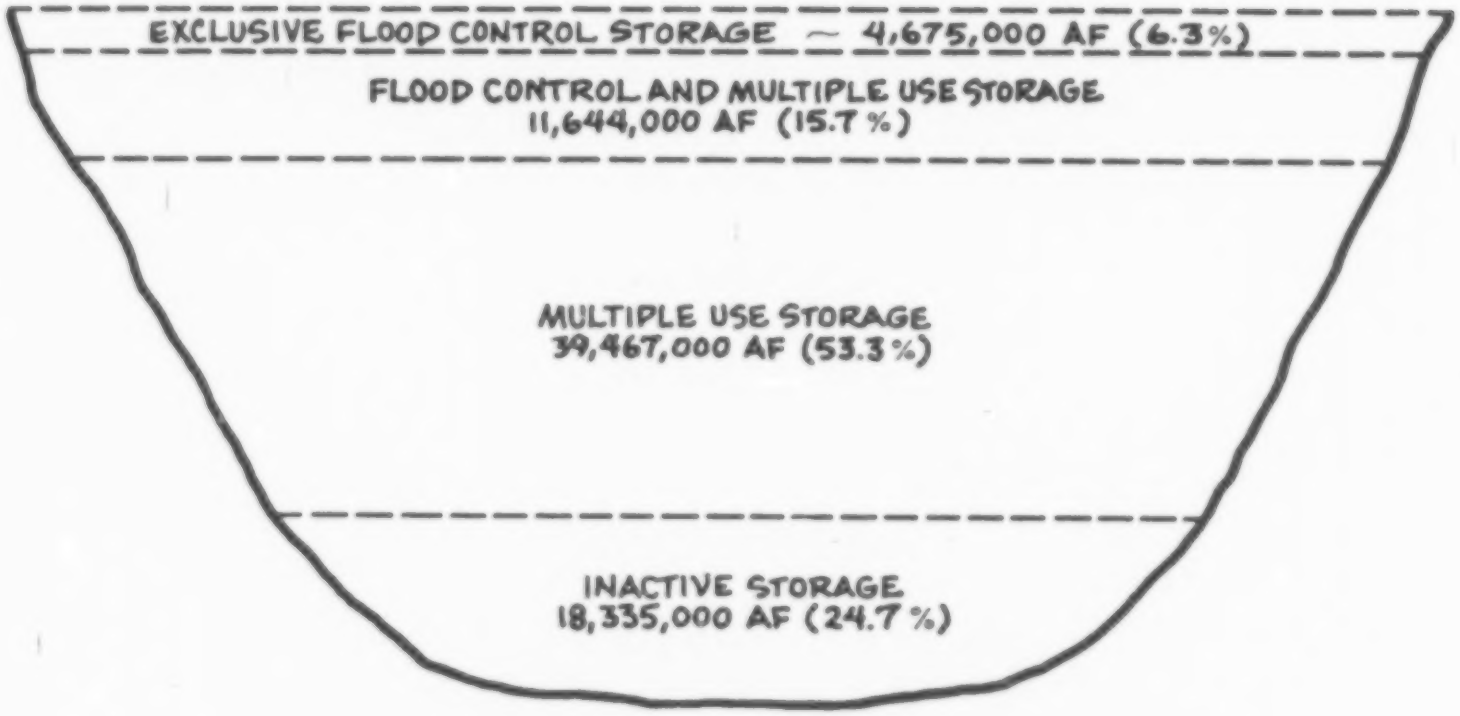
EXCLUSIVE FLOOD CONTROL STORAGE — 4,675,000 AF (6.3%)
FLOOD CONTROL AND MULTIPLE USE STORAGE
11,644,000 AF (15.7%)
MULTIPLE USE STORAGE
39,467,000 AF (53.3%)
INACTIVE STORAGE
18,335,000 AF (24.7%)

Figure B: Diagram of Storage Zones In Missouri River Mainstem Reservoirs.

Congress anticipated in the Upper Basin States. *See* 787 F.2d at 284-85 n.20, ETSI Pet. App. at 29a. The Lower Basin States disingenuously suggest that the Corps can attempt to broaden the definition of surplus water to include all stored flood waters, while simultaneously admitting that Iowa and Missouri have already protested such a modified definition. *See Brief of Respondents in Opposition to Certiorari Petition,* at 8 n.5. Nevertheless, a broader definition of "surplus water" cannot replace the shared administration between the Corps and the Bureau that Congress established in 1944. *See Reply Brief For The Federal Petitioners in Support of Certiorari Petition,* at 3-6.

In summary, the authority granted the two Secretaries is wholly consonant with the overall congressional scheme for development of the Upper Basin of the Missouri River: the Secretary of the Interior has authority over reclamation developments under the Reclamation Act of 1902, subject to Section 8 thereof, thus accomplishing the congressional purpose stated in the preamble of the 1944 Act "to recognize the interests and rights of the States . . . in water utilization and control . . . .," 58 Stat. at 888 (codified at 33 U.S.C. § 701-1). Interior's authority

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53.3% of the total mainstem storage is allocated for beneficial consumptive uses, navigation and power production in what the Corps calls the carry-over multiple-use capacity category. *See 1986-1987 Plan, supra,* at Plate 11; *Master Manual, supra,* at V-2. This water is available for consumptive use in accordance with state law and under water supply contracts from the Bureau of Reclamation. The Bureau's authority over this storage does not interfere with the Corps' flood control function, because that function is covered in the first two storage zones discussed above. In fact, consumptive use of stored water cannot interfere with flood control functions, since withdrawal of water from storage makes space available for flood control. The Corps recognizes that "all irrigation and other upstream water uses for beneficial consumptive purposes" must be satisfied each year from this third category, consistent with the O'Mahoney-Millikin preference provision. *See Master Manual, supra,* at III-3 to III-4, IX-1.

The remaining 24.7% of the total mainstem storage capacity is allocated for what the Corps calls "inactive capacity." *See 1986-1987 Plan, supra,* at Plate 11; *Master Manual, supra,* at V-2. The Corps envisions this zone as the "bottom" zone providing sediment storage capacity and a minimum powerhead, as well as a minimum pool for recreation, fish and wildlife. *Master Plan, supra,* at V-2.

over reclamation water, including municipal water supply, also accomplishes the purposes of the O'Mahoney-Millikin Amendment, because beneficial consumptive uses for "domestic, municipal, stock water, irrigation, mining, or industrial purposes," 58 Stat. at 889 (codified at 33 U.S.C. § 701-1(b)), will be under the ultimate control of the Upper Basin States, again by virtue of the requirement of Section 8 that the Secretary of the Interior conform to state law. Finally, the Corps' authority is limited to water (and storage space) to be devoted to traditional Corps functions, navigation and flood control; any water surplus to those functions could be sold for domestic or industrial use. The various parts of the state-federal accommodation fit together, producing a coherent plan that protects the interests of the states but permits the multi-purpose projects to go forward.

Though Congress faced a novel plan for developing a river basin and chose to delegate authority to implement the plan to two government agencies with very different traditions, temperaments and missions, it harmonized the interests of the arid West and the humid Midwest in an intelligible piece of legislation that accomplished the following central objectives:

> 1. The midwestern states received flood protection and the prospect of receiving some additional water for navigation; the western reclamation states were guaranteed the right to use their legal systems to administer their water resources and had the prospect of receiving federal aid to develop irrigation projects.
>
> 2. The use of water for downstream navigation was subordinated to beneficial consumptive uses for state-validated purposes: domestic, municipal, stock watering, irrigation, mining or industrial uses.

To accomplish these objectives, Congress gave authority to the Corps to build the dams and operate the navigation and flood control components of each project, subject to the limitations set out above, and gave authority to the Secretary of

Interior to operate the reclamation components of each project, subject to the provisions of the 1902 Reclamation Act, a notable feature of which is Section 8, which requires the Secretary to conform to state law.

Neither the objectives nor the means of accomplishing them should be surprising in view of the historical antecedents of the Act, especially the traditional relationship of the federal government to the western states regarding water resources. *See California v. United States*, 438 U.S. 645 (1978). For the first time in history a major multi-purpose project was initiated on a river that ran through reclamation states concerned with agricultural development and also crossed states in the humid Midwest concerned with flood control and navigation, the traditional functions of the Corps. Conflicting claims had to be resolved: traditional state control of water resources in the arid West was in competition with the Corps' suzerainty over rivers in the water-rich Midwest, where navigation and (by 1944) flood control were principal concerns and state control over water resource development was a minor consideration because of the plentitude of water.[12] The compromise that was reached

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[12] Commissioner of Reclamation Harry W. Bashore explained that the clash between Bureau and Corps policies arose because of the climatic differences between the areas where these agencies had traditionally performed their work:

> The problem presented by the Missouri River has arisen because of a clash between policies that are not uniformly adjusted to the climatic differences between the humid East and the Midwest and the arid and semiarid West.
>
> The conflict is between the beneficial, comsumptive use of water in the drier areas for domestic, irrigation, industrial, and mining purposes, and the use of waters in the humid areas to maintain flowing navigation channels. It arises on many, if not all of those streams which, like the Missouri, arise in the mountains west of the 100th meridian and flow out of arid lands into humid climates where irrigation is not necessary to sustain agriculture.
>
> The decision will have to be made by the Congress as to which use of the water resources will take precedence in the West. This same problem was before some of the Western States. The common law of

is what can be expected in a public works project, particularly in 1944, when the New Deal was only 11 years old and when apprehension of a renewed depression upon demobilization of the armed forces was strong: there was something in it for everybody. The Corps was allowed to build major on-stream structures; space was provided in those structures for reclamation water, and the Bureau was encouraged to develop large-scale plans to bring hundreds of thousands of acres under irrigation. The downstream states received substantial protection from floods and regulation of the stream for improved navigation. The upstream states not only had the prospect of new irrigation projects but received a guarantee that their traditional control over their water resources was preserved.

In only one respect was there a head-on collision: if both upstream beneficial consumptive uses and downstream navigation uses could not be satisfied, upstream beneficial consumptive uses had priority. Whether this was the political price for the project or whether it was thought that the conflict would never come about will never be known, but the Act is clear on the outcome: navigation is subordinate. 58 Stat. at 889 (codified at 33 U.S.C. § 701-1(b)). From that fundamental decision flows the remainder of the Act: the Upper Basin States have sovereign authority over allocating beneficial consumptive use; the Bureau has authority over storage water committed for beneficial consumptive use; the Corps has authority over storage space and water used for flood control and navigation.

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riparian rights which was inapplicable to the conditions of the arid region, was supplanted, in most instances quickly, by the theory of appropriation and beneficial use.

Flood-Control Plans and New Projects: Hearings on H.R. 4485 Before the House Comm. on Flood Control, 78th Cong., 2d Sess. 958 (1944) [hereinafter "Flood Control Hearings"]; *see also Hearings on H.R. 3961 Before the House Comm. on Rivers and Harbors*, 78th Cong., 2d Sess. 2 (1944) [hereinafter "Rivers and Harbors Hearings"] (Gov. Moses: it was inevitable that the Corps and Bureau would come into conflict in the Missouri basin in view of their different missions and responsibilities).

II.

THE LEGISLATIVE HISTORY CONFIRMS THE FOREGOING INTERPRETATION OF THE ACT THAT (1) THE BUREAU AND THE CORPS SHARE AUTHORITY OVER STORAGE IN THE DAMS, (2) BENEFICIAL CONSUMPTIVE USE WAS PREFERRED OVER NAVIGATION AND (3) STATE CONTROL OF WATER RESOURCES WAS MAINTAINED.

A. The Pick-Sloan Plan, Adopted by Congress, Reflects Agreement for Shared Authority Over Stored Water Between the Corps and the Bureau.

The single most important document in the legislative history of the Flood Control Act of 1944 is Senate Document No. 247, 78th Cong., 2d Sess. (1944), known as the Pick-Sloan Plan. Rather than setting forth the details of the mainstem Missouri River dams to be constructed, Section 9(a) of the Act simply incorporated by reference the Pick Report (H.R. Doc. No. 475), the Sloan Report (S. Doc. No. 191) and the Pick-Sloan Plan, which reconciled the differences between the two. *See* 58 Stat. at 891.

The Pick-Sloan Plan was a compromise agreement between the Pick Report, H.R. Doc. No. 475, 78th Cong., 2d Sess. (1944), which the Corps prepared, and the Sloan Report, S. Doc. No. 191, 78th Cong., 2d Sess. (1944), which the Bureau prepared.[13] In six pages, the Plan established a comprehensive

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[13] The Pick-Sloan Plan was a shot-gun wedding as well as a compromise; the Corps and the Bureau quickly reached agreement because Congress was threatening to establish a Missouri Valley Authority (along the lines of T.V.A.) that would have divested both the Corps and Bureau of *any* authority over the mainstem reservoirs. *See* 90 Cong. Rec. 8250-51 (1944) (summary by Sen. Murray), 8374 (Sen. Murray), 8422 (Sen. Murray); *see generally* M. Ridgeway, *The Missouri Basin's Pick-Sloan Plan,* 88-91, 93-96 (Univ. of Illinois Press, 1955).

The Corps' Pick Report would have established four small mainstem dams near Mobridge, Pierre, Wheeler and Yankton, South Dakota with a

scheme for water storage on the mainstem of the Missouri River and definitively provided that the Corps and the Bureau would share authority over operations of the mainstem dams to be built by the Corps. Pick-Sloan begins by recognizing the following "basic principles":

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combined total storage capacity of 18,200,000 acre-feet, and one large dam near Garrison, North Dakota with 17,000,000 acre-feet of storage. *See Pick Report,* H.R. Doc. No. 475, 78th Cong., 2d Sess. (1944), at 28 (described in *Pick-Sloan Plan,* S. Doc. No. 247, *supra,* at 2). Fort Peck Reservoir would have been converted into a multiple purpose reservoir, emphasizing irrigation. *Pick-Sloan Plan,* S. Doc. No. 247, *supra,* at 2. Otherwise, the Pick Report was primarily concerned with flood control and navigation, except at Garrison Dam in North Dakota, which also had an irrigation component. *See Pick Report,* H.R. Doc. No. 475, *supra,* at 28, 31; *see also* 90 Cong. Rec. 8489 (1944) (Sen. O'Mahoney: Army plan "dealt primarily with navigation and flood control, with incidental power.").

The Bureau's Sloan Report would have established two small mainstem reservoirs near Wheeler and Joe Creek, South Dakota, with a combined total storage capacity of 5,350,000 acre-feet, one very large mainstem reservoir near Pierre, South Dakota, with storage capacity of 19,600,000 acre-feet, and four tributary reservoirs, with a combined total storage capacity of 6,230,900 acre-feet. *See Sloan Report,* S. Doc. No. 191, 78th Cong., 2d Sess. (1944), at 118 (described in *Pick-Sloan Plan,* S. Doc. No. 247, at 2-3). Fort Peck would have been used primarily for irrigation purposes. *Sloan Report,* S. Doc. No. 191, *supra,* at 115. As would be expected, the Sloan Report was primarily concerned with irrigation uses for Missouri River mainstem water, for the Bureau had long been engaged in comprehensive studies of irrigation in the entire Missouri River Basin. *See, e.g., Sloan Report,* S. Doc. No. 191, *supra,* at 107, 115-17, 123; *see also* 90 Cong. Rec. 8489 (1944) (Sen. O'Mahoney: Bureau plan "dealt primarily with irrigation and reclamation.").

The Pick-Sloan Plan maximized the storage space in the mainstem reservoirs by authorizing both the large dam proposed by the Corps near Garrison, North Dakota (creating what is now Lake Sakakawea) *and* the large dam proposed by the Bureau near Pierre, South Dakota (creating what is now Lake Oahe). The Pick-Sloan Plan also opted for two of the smaller dams proposed by the Bureau (Fort Randall and Big Bend near Wheeler and Joe Creek, South Dakota) and one of the smaller dams proposed by the Corps (Gavins Point near Yankton, South Dakota). *Pick-Sloan Plan,* S. Doc. No. 247, *supra,* at 3. The only mainstem dam proposed by either the Corps or the Bureau that was not approved in Pick-Sloan was the Oak Creek Dam, which was flooded out by the higher Oahe dam proposed by the Bureau.

The substitution of the Bureau's high dam at Oahe for the two low dams proposed by the Corps is further evidence, if such is needed, of the major reclamation ingredient in Pick-Sloan. There would have been no high dam at Oahe, creating a reservoir of 23.3 million acre-feet (about ¾ the size of Hoover Dam's Lake Mead), except for the reclamation component proposed by the Department of the Interior.

> (a) The Corps of Engineers should have the responsibility for determining main stem reservoir capacities and capacities of tributary reservoirs for flood control and navigation.
>
> (b) The Bureau of Reclamation should have the responsibility for determining the reservoir capacities on the main stem and tributaries of the Missouri River for irrigation, the probable extent of future irrigation, and the amount of stream depletion due to irrigation development.
>
> (c) Both agencies recognize the importance of the fullest development of the potential hydroelectric power in the basin consistent with the other beneficial uses of water.

Pick-Sloan Plan, S. Doc. No. 247, *supra,* at 1. The Plan then discussed the capacity and intended purpose of each new mainstem dam and in every instance emphasized that water would be stored for both navigation and irrigation uses as well as for flood control and other uses:

> [T]he following main-stem reservoirs were recommended in the joint engineering report in order to more fully utilize the water resources of the basin and to most effectively serve the present and ultimate requirements of flood control, irrigation, navigation, hydroelectric power, and other uses.
>
> . . . .
>
> [The Garrison Dam will provide] a large volume of useful storage capacity for flood control, navigation, and irrigation . . . .
>
> . . . .
>
> The high Oahe Dam is required in connection with the irrigation of 750,000 acres of land in the James River Basin as well as to provide useful storage for flood control, navigation, the development of hydroelectric power, and other purposes.
>
> . . . .
>
> The use of the Garrison, high Oahe, Big Bend, Fort Randall, and Gavins Point Dams and Reservoirs as outlined above and agreed upon in the joint engineering

> report will provide the desired degree of flood control, supply the needs of irrigation as well as furnish cyclic storage for navigation during prolonged drought periods.
>
> . . . .
>
> Development of the Missouri River Basin in accordance with House Document No. 475, Seventy-eighth Congress, second session, and Senate Document 191, Seventy-eighth Congress, second session, as coordinated in the enclosed joint engineering report, if authorized as a unified plan, will secure the maximum benefits for flood control, irrigation, navigation, power, domestic and sanitary purposes, wildlife, and recreation.

Id. at 3-5. In short, whenever navigation was mentioned, so was irrigation.

The specification in the joint report of the Bureau and Corps that the dams were to be operated for both irrigation and navigation/flood control purposes amounted to a delineation of the authority of the two agencies. The Bureau was expert at irrigation of which the Corps knew nothing; the Corps was expert at navigation and flood control, of which the Bureau knew little. The compromise would not have occurred if the authority of the two agencies had not been preserved for each to perform its traditional function. Moreover, as to the irrigation component, only the Bureau satisfied the declaration of policy in the Act's preamble, recognizing "the interests and rights of the States in determining the development of the watersheds within their borders and likewise their interests and rights in water utilization and control . . . ." 58 Stat. at 888. The Bureau alone satisfied this policy requirement because it alone operated under the command to conform to state law. *See* Reclamation Act of 1902, § 8, 32 Stat. 388, 390 (codified at 43 U.S.C. §§ 372 and 383).

Other actions of the Corps and the Bureau confirm the agreement to share authority over the stored water. In

commenting on the Bureau's Sloan Report in April 1944, Chief of Engineers, Major General Reybold stated:

> It is essential that the main stem reservoirs in North and South Dakota be built, operated, and maintained by the Corps of Engineers as stated in my report and in your letter of December 17, 1943, both printed in House Document 475. Tributary reservoirs should, when advisable from the standpoint of basin-wide development, be constructed, operated, and maintained by the agency with dominant interest under existing law. In *all* reservoirs, utilization of storage for flood control should be in accordance with regulations prescribed by the Secretary of War and utilization of storage for irrigation should be in accordance with regulations prescribed by the Secretary of the Interior.

Sloan Report, S. Doc. No. 191, *supra,* at 7-8 (emphasis added); *see also Pick Report,* H.R. Doc. No. 475, *supra,* at 4 ("utilization of storage reserved for irrigation in all multiple-purpose reservoirs should be in accordance with regulations prescribed by the Secretary of the Interior").[14] In the Pick Report Major General Reybold explained, "The Corps of Engineers recognizes the broad and important interests and responsibilities of the Bureau of Reclamation in the Missouri River Basin and will continue to plan its work in that basin so as to coordinate fully the activities of both agencies." *Pick Report,* H.R. Doc. No. 475, *supra,* at 3. The Pick Report discussed the practical aspects of how such joint administration would work:

> In connection with the development of the multiple-purpose projects, those shown for the Missouri River will provide for the maximum practicable storage of water of the main stem. The water to be impounded in these, as

[14] The Corps considered the mainstem Missouri River reservoirs to be multiple purpose reservoirs. The Pick Report that Reybold was endorsing presented a plan "which provides for the construction of 12 additional multiple-purpose reservoirs, 5 on the Missouri River with dams located above Sioux City . . . [and 7 on Missouri River tributaries]." *Pick Report,* H.R. Doc. No. 475, *supra,* at 16.

> well as the other multiple-purpose structures shown in tables 1 and 2, will be utilized to produce the maximum practicable development of irrigation, navigation, power, and other multiple purposes. However, sufficient storage will be provided in each reservoir to provide for the needs of local flood protection downstream from the reservoir as well as for the needs of the general comprehensive plan for flood control for the Missouri River Basin. To provide for the maximum utilization of the waters stored in multiple-purpose reservoirs, a plan would be worked out for each structure in collaboration with the various water-use agencies involved. The amount of water to be made available to the Bureau of Reclamation for irrigation would be arrived at after close collaboration with that agency.

Id. at 30. At the House hearings on the flood control bill, Colonel Reber specifically stated that the Bureau would manage irrigation features at dams built by the Corps:

> Mr. Curtis. If the Army constructs any dam that has features in it for irrigation or as a distributing system, its construction and its maintenance and its management for irrigation will be turned over to the Bureau of Reclamation; is that right?
>
> Colonel Reber. That is correct.

Flood Control Hearings, supra, at 1073.

The Bureau shared the Corps' view of how the mainstem dams would be cooperatively administered, with the Corps managing the flood control and navigation functions and the Bureau managing the irrigation and reclamation functions. The Bureau of Reclamation's Board of Review stated in the Sloan Report:

> The agency with primary interest in the dominant function of any feature proposed in the plan should construct and operate that feature, giving full recognition, in the design, construction, and operation, to the needs of other agencies with minor interests. All reservoirs where flood control and navigation are dominant should be

> operated by the Corps of Engineers, and where the flood control and navigation functions are minor, the reservoirs should be operated in accordance with regulations of the Corps so far as flood control and navigation are concerned. *All irrigation features should be operated by the Bureau of Reclamation or its agents.* All reservoirs in which irrigation, restoration of surface and ground waters, or power, is dominant, should be operated by the Bureau of Reclamation. *Where these functions are minor, the reservoirs should be operated under regulations of the Bureau of Reclamation so far as such functions are concerned.* In like manner, agencies with jurisdiction over other functions should be recognized.

Sloan Report, S. Doc. No. 191, *supra*, at 11 (emphasis added).

Congressional debates reveal that Congress understood that the two agencies would share authority. In the course of the debates the particular issue of "surplus water" in Section 6 was clarified. Members of Congress debating the Flood Control Act specifically relied on the assurances of the Corps and Bureau in the Pick and Sloan Reports and elsewhere that the Bureau would control storage allocated to reclamation in Corps' constructed reservoirs. *See* 90 Cong. Rec. 4141 (1944) (Rep. Case). When discussing the reference in what ultimately became Section 6 of the Act to "surplus water" that would be subject to disposal by the Corps, the members of Congress understood that surplus water referred only to water stored for purposes within the Corps' traditional domain, flood control and navigation, and would not include reclamation water. *See* 90 Cong. Rec. 4133 (1944) (comments of Rep. Curtis concerning Section 4 [eventually renumbered as Section 6, 90 Cong. Rec. 8546 (1944)]: "It would be my opinion that water appropriated for irrigation is not surplus water."); *see also Flood Control Hearings, supra*, at 559 (testimony of Clifford Stone: surplus water is water impounded by the Corps in a flood that would otherwise be quickly released to maintain future flood storage space). All storage allocated to reclamation was to be regulated by the Bureau of Reclamation under

the federal reclamation laws. 90 Cong. Rec. 4143 (1944) (Rep. Case); *see also id.* at 4125 (colloquy between Reps. Chenoweth and Whittington). Representative Curtis of Nebraska noted that the words of then Section 4 on surplus water were not the "choicest" and asked the following question of Representative Whittington, the chairman of the House Flood Control Committee:

> May I ask the chairman of the committee if he will not agree with me in this statement in order that we might show legislative intent, that it was not our intention to include the sale of water for irrigation purposes under section 4, that that dealt with other uses of water?
>
> [Rep. Whittington] Absolutely . . . .

90 Cong. Rec. 4134 (1944). Representative Whittington then added so "there should not be any uncertainty" that:

> I think there need not be any fear that the intent of the committee as well as the language of the bill would not make it [then section 4] applicable to irrigation. If it were, irrigation would be disposed of by the Secretary of the Interior.

Id.; see also 90 Cong. Rec. 4197 (1944) (Representative Whittington: "as I stated yesterday, the purpose of section 4 in no way involves reclamation."); *see also id.* at 4202 (colloquy between Reps. Curtis and Whittington).

It should be noted that the terms "irrigation" and "reclamation" were used interchangeably by Representative Whittington and others. The functional meaning of both terms is the storage in the six Pick-Sloan reservoirs allocated to Bureau functions. Irrigation and reclamation encompass agriculture but extend also to other beneficial consumptive uses.

When the flood control bill reached the Senate, Senator O'Mahoney proposed an amendment to Section 6 (Section 4 in the House) that would have allowed the Secretary of War to dispose of all stored water at Corps-constructed reservoirs, but that restricted the Secretary in a manner analogous to the

restrictions imposed by the reclamation laws. *See* 90 Cong. Rec. 8548 (1944). Other western senators vigorously opposed this amendment, preferring not to involve the Army in irrigation and reclamation functions at all. *See id.* at 8548-49. These senators preferred the language adopted in the House (and ultimately adopted in Section 6 of the Act) by which the Secretary of the Army was authorized to sell surplus water only for "domestic and industrial uses." 90 Cong. Rec. 8546, 8548 (1944). Senator Hayden believed that the House's use of the terms "domestic" and "industrial" and omission of the term "irrigation," effectively prevented reclamation water from coming within the Corps' domain as "surplus water." *Id.* at 8546.

The Eighth Circuit was aware of the Pick-Sloan Plan, *see* 787 F.2d at 275-76, ETSI Pet. App. at 8a-10a, but utterly failed to appreciate its significance. The court seemed unable to comprehend the concept of shared authority whereby the Bureau could make its reclamation water available for industrial use under the Reclamation Project Act of 1939 at the same time the Corps was selling flood control water for industrial use as "surplus water" under Section 6 of the Flood Control Act of 1944. The court merely restated the district court's simplistic analysis, which concluded that because the Corps built the Oahe dam, Lake Oahe is not a reclamation development and none of its water is subject to the authority of the Bureau.[15] *See* 787 F.2d at 280-81, ETSI Pet. App. at 19a-21a. The court erroneously characterized the question of division of authority

[15] The court of appeals may have believed that it was promoting administrative efficiency by holding that the Corps had sole authority to manage the mainstem Missouri dams. Congress, however, anticipated that the Bureau and the Corps would share authority over the mainstem reservoirs. *See supra*, Section II(A). Congress, the Corps, and the Bureau recognized that individual dams and reservoirs could not be operated in isolation. Management for multi-purpose use required close coordination of operations of each feature and close coordination among agencies and between agencies and state authorities. Thus, flood control and navigation uses for stored water had to be coordinated with irrigation and reclamation uses. *See, e.g., Pick Report*, H.R. Doc. No. 475, *supra*, at 3, 4, 6, 7, 12, 17, 27-29; *Sloan Report*, S. Doc. No. 191, *supra*, at 7, 8, 17, 116, 117.

between the Corps and Bureau as one of fact, reviewable under the clearly erroneous standard. 787 F.2d at 280, ETSI Pet. App. at 19a. Even under that standard, the district court should have been reversed. But the issue is not one of fact; it is the legal question of statutory interpretation. Congress' intent is unmistakable: The Flood Control Act of 1944 adopted the Missouri Basin development plan jointly proposed by the Corps and Bureau; the Corps and Bureau both intended that the Corps would have authority over storage allocated to flood control and navigation and the Bureau would have authority over storage allocated to reclamation and upstream consumptive use. Congress approved and adopted that allocation of authority.

B. The Debates Show That Congress Intended a Preference for Consumptive Uses Over Navigation Uses and Thus Intended to Confirm the Right, Power and Authority of the Upper Basin States Over Water Stored Within Their Boundaries.

The Lower Basin States did not bring this lawsuit as disinterested ombudsmen seeking only to assure that the correct federal agency sign water service contracts. From its inception, this lawsuit has been a thinly veiled artifice to block consumptive use by the Upper Basin States of the mainstream water.[16] The Respondents understand only too well that when Congress chooses the agency to develop a river basin it also chooses the legal regime that will apply to water resource development. The Bureau operates in conformity to state law; the Corps follows a separate agenda and can be insensitive to a state's management of its water resources.[17] So far, the Lower

[16] *See, e.g., Missouri v. Andrews*, No. CV-82-L-442, *Complaint for Injunctive and Declaratory Relief*, paragraphs 26, 49, 55 and 75 (D. Neb. filed Aug. 18, 1982).

[17] Senator Overton explained these agencies' separate roles:

> For years the Army engineers have worked in the Missouri River Basin in order to determine proper projects for flood control and navigation and

Basin States have accomplished their objective in this lawsuit. The Eighth Circuit's decision upsets the division of authority Congress mandated and thus has upset Congress' plan for the use of stored Missouri River water. The decision must be reversed if Congress' will is to be done.

What Congress realized and the Eighth Circuit did not is that the Bureau of Reclamation promotes and facilitates consumptive use of water in the four Upper Basin Reclamation States and does so in tandem with each State's regime for administering water resources. Congress instructed the Bureau in Section 8 of the Reclamation Act of 1902 to defer to state laws governing control, appropriation, use or distribution of reclamation water, and, except where Congress expressly says otherwise, deference to state law has been the Bureau's obligation since 1902. *See California v. United States,* 438 U.S. 645, 653-54, 675, 678 n. 31 (1978). The members of the House and Senate who debated and approved the Flood Control Act of 1944 were fully informed on the Bureau's expertise in irrigation and reclamation and were acutely aware of its obligation to defer to state law.[18] The representatives of the western states

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> for a number of years the expert engineers of the Bureau of Reclamation have been working in order to decide upon proper projects for irrigation and local beneficial uses of water in the States comprising the Missouri Basin.

90 Cong. Rec. 8375 (1944).

[18] *See* 90 Cong. Rec. 4134 (1944) (Rep. Curtis), 4140 (Rep. Burdick), 4141-42 (Rep. Burdick — quoting Judge Stone), 4197 (Reps. Robinson, Rockwell), 4215 (Rep. Dirksen), 4216 (Rep. Sullivan); 90 Cong. Rec. 8245 (1944) (Sen. Overton), 8545 (quoting letter from Secretary Ickes), 8548-49 (Sen. Hatch); *see also* 90 Cong. Rec. 2913 (1944) (Rep. Lemke in debate on rivers and harbors bill). The Bureau appreciated the significance of not disturbing existing water rights under western states' water law. Bureau Commissioner Bashore testified:

> The fact that the water is apportioned under States laws in the West is a reason why there is very serious danger in the dedication by the Congress of the waters of the great rivers that arise in the arid zone and flow into the humid zone to the purpose of navigation to the exclusion of future irrigation development upstream.

Flood Control Hearings, supra, at 960.

and their allies fought hard in both the House and the Senate to preserve an active role for the Bureau in administration of Missouri River mainstream waters, and they succeeded. The Senate adopted their view in the O'Mahoney-Millikin Amendment, 90 Cong. Rec. 8547, 8553 (1944), and the conference incorporated the Senate language in the final language of the Flood Control Act, 90 Cong. Rec. 9263 (1944). *See* 58 Stat. 887, 888-89. The identical provisions were incorporated in the companion bill that became the Rivers and Harbors Act of 1945, 59 Stat. 10, 10-11. *See* 90 Cong. Rec. 8671-73 (1944).

The legislative history demonstrates that Congress intended the O'Mahoney-Millikin Amendment to ensure that preference would be given to consumptive uses of Missouri River mainstem water over navigation uses. *See, e.g.*, 90 Cong. Rec. 8485 (1944) (Sen. O'Mahoney). Congress considered upstream consumptive uses more worthy than downstream navigation uses. *See* Flood Control Act of 1944, § 1(b), 58 Stat. at 889; *see also* 90 Cong. Rec. 4130 (1944) (Rep. Curtis: noting importance of irrigation); 4212 (Rep. Lemke: Upper Basin States should have preference to their own waters for domestic use and for irrigation).[19] Representative Lemke of North Dakota passionately contrasted the value of irrigation and navigation: "We are not going to take the water from the people in the States where it originated so that some fellow may float a yacht down the lower Mississippi Valley, while the people and their cattle in the upper regions go hungry on

[19] The preference for consumptive uses over navigation uses is also abundantly clear from the debates on the rivers and harbors bill. *See* 90 Cong. Rec. 2836 (1944) (Rep. Barrett), 2838 (Rep. O'Connor), 2839 (Rep. Lemke), 2843 (Rep. Mundt), 2844 (Rep. Dirksen), 2857 (Rep. Robinson), 2911 (Rep. White). Advocates of irrigation use noted how little the Missouri was used for navigation to and from the Upper Basin States. *Id.* at 2913 ("As far as being an avenue for transportation for the upper States it never did exist to any great extent and to what little extent it was used has been so long ago that it no longer remains in the memory of the present generation."). Congress did not have reliable figures on future stream flows under the Pick-Sloan Plan, so it had to establish priorities in the event of a conflict between uses. *See* M. Ridgeway, *The Missouri Basin's Pick-Sloan Plan*, at 163 (Univ. of Illinois Press, 1955).

account of the lack of food and water." 90 Cong. Rec. 4213 (1944).

Giving the Bureau authority over storage allocated to irrigation and reclamation was an integral part of the mechanism for preferring consumptive uses to navigation uses and for confirming state control over its water. Representative Curtis explained why the flood control bill vested significant authority in the Bureau:

> I believe that the Bureau of Reclamation, being a western agency, being committed to the doctrine of consumptive and beneficial use of water, and in view of its past record covering protection of State rights and the protection of the water rights of the individual, will exercise its authority judicially [sic] and that that is the very best we can do.

90 Cong. Rec. 4134 (1944). The division of authority between the Bureau and the Corps was not the goal in itself, but merely a means to an end — preserving priority for consumptive uses of stored water and guaranteeing to the states their traditional role in the use and allocation of such stored water. *See, e.g.*, 90 Cong. Rec. 4123 (1944) (Rep. Whittington: Committee on Flood Control did not include any provision that would retard reclamation because of concern expressed about the rights of states to the uses of water); 4134 (Rep. Curtis: noting that regulation of reservoir storage space for irrigation water will be turned over to Bureau of Reclamation, which "can be trusted to recognize both State rights and the individual rights of the owners of the water."); 4140 (Rep. Burdick: noting concern with Corps' control over water — "The Reclamation Bureau has worked with the States; they have worked with North Dakota and other States; and the use of water is regulated by the States."); 4197 (Rep. Robinson: requiring that federal government comply with federal reclamation laws would resolve western states' fears that they will lose jurisdiction over waters arising in their states).

This Court cannot rule on the question of division of authority between the Corps and Bureau without taking into account the goals that shaped the division of authority; the evidence is overwhelming that Congress intended to give priority to consumptive uses and defer to state water law. It is therefore anomalous that the Eighth Circuit believed it could not take into account the competing interests of the Upper Basin and Lower Basin States in construing the Flood Control Act's "delicate balance of authority" between the Bureau and the Corps. *See* 787 F.2d at 286, ETSI Pet. App. at 32a. In attempting to avoid the sensitive issues that divided the states of the Missouri Basin, ostensibly because it had to "defer to legislative prerogative," the court of appeals ignored the most probative evidence in the Flood Control Act's legislative history. *Id.* The Eighth Circuit did not have to resolve the dispute between the Upper Basin and Lower Basin States; Congress had already resolved the issue, and the court merely had to take note of Congress' resolution of it, made manifest in its division of authority between the Corps and Bureau and its preference for upstream consumptive uses over downstream navigation uses.

The theme of preserving the Upper Basin States' rights to control a portion of the stored waters within their territorial boundaries permeates the congressional debates on the Act.[20]

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[20] *See, e.g.*, 90 Cong. Rec. 4119 (1944) (Rep. Mundt: noting need to protect irrigation interests in upper portions of Missouri Valley); 4139 (Rep. Clason: expressing concern that new federal flood control legislation not usurp states' rights to control water within their boundaries); 4141 (Rep. Burdick: expressing fear that arid and semi-arid western states will be divested of title to their own water); 4197 (Rep. Rockwell: in the early days, people in western states fought for right to use water to grow crops and resolved issues through cooperation with Department of Interior); 4212 (Rep. Lemke: protection of irrigation in the Upper Missouri River Basin "is a State-right matter."); 4214 (Rep. Mansfield: water is the lifeblood of the western states; Rep. Cochran: controversy prevailing between flood control and irrigation is actually controversy between Upper Basin States and Lower Basin States); 4216 (Rep. Sullivan: arid-land states seek protection of irrigation and reclamation based on rights and customs enjoyed under riparian and

The representatives of the Upper Basin, led by Senator O'Mahoney (of Wyoming), were concerned that Congress would inadvertently disrupt traditional water rights law and establish new rights to navigation water under its Commerce Clause powers when it passed legislation intended to address the menace of floods on the Missouri that also provided for huge volumes of storage capacity at the same time. For example, Senator Wheeler of Montana stated:

> While it is true that it is a flood-control bill, we must bear in mind that its provisions reach much further than do the provisions of a mere flood-control bill, because in the pending bill an effort is made to lay down a policy not only as to flood control but with respect to the development of power, the sale of power, irrigation, and reclamation.

90 Cong. Rec. 8252 (1944). The immediate impetus of H.R. 4485, which became the Flood Control Act of 1944, was precisely that: flood control. A series of three devastating floods had caused widespread damage in the lower Missouri Valley, and Congress was primed to address the problem. *See* H.R. Rep. No. 1309, 78th Cong., 2d Sess., *reprinted in* 1944 U.S. Code Cong. Serv. at 1349-51; *see generally* M. Ridgeway, *The Missouri Basin's Pick-Sloan Plan*, 3-5 (Univ. of Illinois Press, 1955). Congress was, however, simultaneously considering legislation to enlarge the channel in the lower portion of

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appropriation doctrines); 90 Cong. Rec. 8227 (1944) (Sen. Murray [prior to addition of O'Mahoney-Millikin language]: flood control bill does not adequately protect rights of Upper Basin States); 8374 (Sen. Murray: flood control bill has been fought because "it totally ignores the irrigation rights of the States in the upper part of the valley"), 8485 (Sen. O'Mahoney: Pick-Sloan Plan was a "redeclaration of the historic doctrine of priority of the consumptive uses of water in the [arid-land] States"); *see also Flood Control: Hearings on H.R. 4485 Before a Subcomm. of the Sen. Comm. on Commerce*, 78th Cong., 2d Sess. 544 (1944) (Gov. Ford [of Montana]: "we are not satisfied with just having the dams; we want the right to the use of the waters behind those dams").

The theme of preserving states' rights also appeared in the debates on the rivers and harbors bill, especially in the house debates that occurred prior to acceptance of the O'Mahoney-Millikin Amendment by the Senate. *See* 90 Cong. Rec. 2835 (1944) (Rep. Barrett), 2840 (Rep. Case), 2841 (Rep. Burdick), 2857 (Rep. Robinson), 2912 (1944) (Rep. Hill).

the Missouri River mainstem (below Sioux City, Iowa) to promote navigation. *See* H.R. 3961, 78th Cong., 2d Sess. (1944) (eventually enacted as the Rivers and Harbors Act of 1945, 59 Stat. 10). This proposal for a channel nine-feet deep to replace the six-foot channel gave the Upper Basin States grave concern because a deeper channel would require larger volumes of water to keep it full, possibly to the detriment of upstream consumptive uses. The Upper Basin States feared that congressional action establishing such a navigation channel would vest water rights in the Lower Basin States where the navigation channel was located and would thus preclude future consumptive uses.[21]

The Upper Basin States mobilized their forces first in the House and then in the Senate. The constant refrain from the Lower Basin States and their allies was that the flood control legislation (H.R. 4485) and rivers and harbors legislation (H.R. 3961) were not intended to create any water rights or to deprive the Upper Basin States of their traditional hegemony over their water. Senator Clark of Missouri argued:

> [T]he bill originally started as a strictly flood-control measure, and . . . the whole question of irrigation and reclamation was injected into the measure entirely improperly and irrelevantly, in my opinion, by an amendment introduced by the Senator from Wyoming [Mr. O'Mahoney], joined in by numerous Senators from other irrigation States.
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> . . . .
>
> [I]t is unfair . . . to say at this time that the bill is not a strictly flood-control bill . . . .

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[21] *See, e.g., Flood Control Hearings, supra,* at 1021-22, 1031, 1218, 1222; *Rivers and Harbors Hearings, supra,* at 9. The Missouri Valley Regional Planning Commission had noted in a 1942 study that there was a strong likelihood of a clash between consumptive uses and navigation and that principles of priority should be established. *See* M. Ridgeway, *The Missouri Basin's Pick-Sloan Plan,* 44-45, 67 (Univ. of Illinois Press, 1955). The representatives of the Upper Basin States saw the Pick Report as a threat to continued development of western and Great Plains irrigation. *Id.* at 75.

> [T]hose who were interested in navigation and those who were interested in flood control were not responsible for injecting extraneous issues into [the flood-control bill and rivers and harbors bill].

90 Cong. Rec. 8253 (1944).[22]

The Upper Basin States were not convinced by such easy assurances and demanded the guarantees enacted in the O'Mahoney-Millikin Amendment, reflected in Section 1 of the Flood Control Act of 1944, 58 Stat. at 888-89, and in Section 1 of the Rivers and Harbors Act of 1945, 59 Stat. at 10-11. No observer of the congressional debates could have missed the implications of this victory: Congress had created a priority for consumptive uses of Missouri River mainstem water over navigation uses and had confirmed the Upper Basin States' rights to control a significant portion of the stored mainstem waters. By threatening to place the entire Missouri mainstem storage capacity under the effective authority of the Corps, the Eighth Circuit's ruling is antithetical to Congress' goals as reflected in the provisions of the Act, particularly the O'Mahoney-Millikin Amendment. This Court should correct the Eighth Circuit's gross misconstruction of the Act in order to assure that the vast water resources of the Missouri River Basin will be administered in accordance with Congress' intent, in a manner that preserves the right of all states in the basin to a portion of the benefits from the Missouri.

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[22] At the hearings on the flood control bill, Colonel Reber repeatedly denied that the Corps' Pick Report would establish any priorities for use of Missouri River water. *See Flood Control Hearings, supra,* at 669, 722, 1061, 1065, 1076. For other examples of the Lower Basin States' denial that the flood control bill and rivers and harbors bill did not affect upstream consumptive uses, *see* 90 Cong. Rec. 2836 (1944) (Rep. Carter), 2837 (Rep. O'Connor), 2842 (Rep. Bell), 2920 (1944) (Rep. Hoeven), 4123 (Rep. Whittington: no provision in H.R. 4485 "would in any way retard reclamation."), 4124 (Rep. Whittington: "There is no real conflict between navigation, flood control, and irrigation"), 4131 (Rep. Curtis: "The approval of the Pick plan does not add or detract from the navigation issue."), 4142 (Rep. Curtis: allocation of water for navigation is not at issue in flood control bill), 4199 (1944) (Rep. Whittington: flood control bill does not embrace any navigation project); 90 Cong. Rec. 8251 (1944) (Sen. Clark: "[T]his is a flood-control bill, not a navigation bill, not a river and harbor bill, not a power bill.").

CONCLUSION

Both the district court and the Eighth Circuit adopted the basic position, variously stated, of the Lower Basin States that until and unless water is actually diverted from Lake Oahe (and the other mainstem reservoirs) and applied to the land to raise crops, the reclamation laws and state law have no application to the waters of the Missouri River stored in the Upper Basin States, and accordingly the Secretary of Interior has no authority over that water. *See, e.g.*, 787 F.2d at 280; 586 F. Supp. at 1273-74.

This is a most convenient argument for the Respondent States in current times, when federally financed irrigation projects are out of favor. By succeeding in the lower courts with the argument, the Lower Basin States obtained from the judiciary what was denied them by Congress — dedication of the river to Lower Basin navigation interests. No doubt Senators O'Mahoney, Millikin and others from the West anticipated federal funding of irrigation projects in the Missouri Basin in due course. But it is impossible to believe that western senators, who insisted on the O'Mahoney-Millikin Amendment and who were aware of the time it takes for arid, Upper Basin areas to develop, agreed that state permits and Bureau water supply contracts for non-agricultural use are void. The proponents of O'Mahoney-Millikin were writing a charter for the Missouri Basin, to endure until Congress — not the courts — changed it. Thus the preamble to the Act and O'Mahoney-Millikin reaffirmed state right, power and authority over the water resource, subordinated downstream navigation use to Upper Basin beneficial consumptive use and implemented those decisions by limiting federal power and Corps authority to navigation and flood control purposes and by imposing the Reclamation Act of 1902 and Section 8 thereof on the operation of the dam for other purposes.

WHEREFORE, the Upper Missouri River Basin States of Montana, North Dakota, South Dakota and Wyoming respectfully request that this Court reverse the judgment of the Court of Appeals for the Eighth Circuit and declare that in accordance with Sections 1(a), 1(b), and 9(c) of the Flood Control Act of 1944, Section 9(c) of the Reclamation Project Act of 1939 and the Reclamation Act of 1902, and especially Section 8 thereof, the Water Service Contract between ETSI and the Bureau of Reclamation, made pursuant to the permit granted by the South Dakota Water Management Board, is valid and enforceable.

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Respectfully submitted,

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